No. 13-599

In the Supreme Court of the United States

MINGO LOGAN COAL COMPANY, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether Section 404(c) of the Clean Water Act, 33 U.S.C. 1344(c), authorizes the United States Environmental Protection Agency to withdraw the specification of a disposal site for dredged or fill material after the United States Army Corps of Engineers has specified the site in a permit issued under Section 404(a) of the Act, 33 U.S.C. 1344(a).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 714 F.3d 608. The opinion of the district court (Pet. App. 20-65) is reported at 850 F. Supp. 2d 133.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 2013. A petition for rehearing was denied on July 25, 2013 (Pet. App. 18-19). On September 20, 2013, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including November 13, 2013, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Clean Water Act (CWA), 33 U.S.C. 1251 *et seq.*, aims to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). To achieve that goal, Congress has prohibited "the discharge of any pollutant" into navigable waters except in accordance with the CWA's terms. 33 U.S.C. 1311(a). As relevant here, rock is a byproduct of surface coal mining that is a pollutant classified as "fill material" when, for example, its discharge replaces water with dry land. 33 U.S.C. 1362(6); 33 C.F.R. 323.2(e)(1)(i); 40 C.F.R. 232.2.

Section 404 of the CWA, which is codified at 33 U.S.C. 1344, allows the United States Army Corps of Engineers (Corps) to "issue permits * * * for the discharge of dredged or fill material into the navigable waters [of the United States] at specified disposal sites." 33 U.S.C. 1344(a). Section 1344(b) states that "[s]ubject to subsection (c) of this section, each such disposal site shall be specified for each such permit by the" Corps. 33 U.S.C. 1344(b). Section 1344(c), the provision directly at issue in this case, states that the United States Environmental Protection Agency (EPA) "is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site." 33 U.S.C. 1344(c). The EPA may take that step "whenever" the agency determines that disposing dredged or fill material "will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas * * *, wildlife, or recreational areas." *Ibid.* Before exercising its authority under Section 1344(c), however, the EPA must provide "notice and opportunity for public hearings" and must "consult with" the Corps. *Ibid.*

Section 1344's division of regulatory authority between the EPA and the Corps derives from a legislative compromise. The Senate version of the bill would have authorized the EPA itself to issue permits for the discharge of any pollutant, including dredged and fill material. S. 2770, 92d Cong. § 2, 117 Cong. Rec. 38,884 (as passed by Senate Nov. 2, 1971) (proposed CWA § 402(m)). The House of Representatives bill, by contrast, would have allowed the Corps to continue its traditional role of issuing permits for dredged and fill material. H.R. 11,896, 92d Cong., § 2 (as reported by H. Comm. on Pub. Works Mar. 11, 1972), H.R. Rep. No. 911, 92d Cong., 2d Sess. 52 (proposed CWA § 404); cf. 33 U.S.C. 403 (Corps authority tracing back to the Rivers and Harbors Appropriation Act of 1899). Section 1344 as ultimately enacted vests the power to issue such permits in the Corps, while authorizing the EPA to "prohibit" or "withdraw[]" the Corps' specification of "any" disposal site. 33 U.S.C. 1344(b) and (c).

b. "Except as otherwise expressly provided," the EPA administers the CWA and is authorized to "prescribe such regulations as are necessary to carry out [its] functions." 33 U.S.C. 1251(d), 1361(a). In 1979, the EPA published regulations at 40 C.F.R. Part 231 regarding the exercise of its authority under Section 1344(c). Those regulations anticipate that "proceedings under Part 231" may occur "[w]here a permit has already been issued." 40 C.F.R. 231.7. They also apply to pre-existing disposal sites. See 40 C.F.R. 231.1(c) ("These regulations apply to all existing * * * disposal sites."); 40 C.F.R. 231.2(a) ("*Withdraw specification* means to remove from designation any area already specified as a disposal site."). And the procedures account for both permit applicants and permit

holders. 40 C.F.R. 231.3(d)(2) (requiring that public notice of the EPA's proposed determination be mailed to, *inter alia*, "the permit applicant or permit holder"); 40 C.F.R. 231.4(b) (noting that "an affected landowner or permit applicant or holder" may request a hearing).

When the EPA adopted its Section 1344(c) regulations, it rejected commenters' suggestions that "use of [Section 1344(c)] after the issuance of a permit by the Corps * * * was outside the scope of" the statute. *Denial or Restriction of Disposal Sites; Section 404(c) Procedures*, 44 Fed. Reg. 58,076, 58,077 (Oct. 9, 1979); see *Guidelines for Specification of Disposal Sites for Dredged or Fill Material*, 45 Fed. Reg. 85,336, 85,337 (Dec. 24, 1980) (subsequently issued guidelines noting that the EPA may act "in unusual circumstances, after issuance of a permit"). The EPA stated that Section 1344(c) "clearly allows EPA to act after the Corps has issued a permit." 44 Fed. Reg. at 58,077. The agency also recognized, however, that "where possible it is much preferable to exercise this authority before the Corps * * * has issued a permit, and before the permit holder has begun operations." *Ibid.* The EPA therefore stated that it "would be inappropriate to use [Section 1344(c)]" in certain post-permit circumstances, "unless substantial new information is first brought to the Agency's attention after issuance." *Ibid.* The agency characterized its general approach as a "policy of restraint on the use of [Section 1344(c)] after issuance." *Ibid.*

c. Consistent with that judicious exercise of its discretionary authority under the statute, the EPA has acted under Section 1344(c) only 13 times in the provision's 41-year history—accounting for a miniscule fraction of the volume of permits issued by the Corps

during that time. See EPA, *Chronology of 404(c) Actions*, http://water.epa.gov/lawsregs/guidance/wetlands/404c.cfm (last visited Feb. 14, 2014). The agency has been particularly circumspect in deciding to withdraw disposal sites specified in an existing permit. This case represents only the third time that has occurred, with the previous instances occurring in 1981 and 1992. See Pet. App. 11 n.3 (discussing 1981 post-permit action); *James City County, Va.* v. *EPA*, 12 F.3d 1330, 1331-1332 (4th Cir. 1993) (discussing 1992 post-permit action), cert. denied, 513 U.S. 823 (1994).[1]

d. The Corps has not disputed that the EPA's Section 1344(c) authority persists after a permit issues. Thus, in a 1985 memorandum, the Corps' chief counsel concluded that "the plain words of [Section 1344(c)] (as well as legislative history * * *) suggest that Congress authorized EPA to invoke its [Section 1344(c)] authority * * * after a permit has been granted"

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[1] The district court attempted to distinguish the EPA's 1981 action on the ground that the restricted and withdrawn specification was the subject of a proposed modification to an existing permit. Pet. App. 59 n.14. That the EPA prevented the issuance of a *modified* permit including that specification does not, however, alter the fact that its action also applied (as here) to the specification contained in a *previously issued* permit. Nor is there any merit to petitioner's previous suggestion (Pet. C.A. Br. 57 n.26) that, in *James City County*, the "EPA acted before the Corps issued its permit." In that case, the Corps issued the permit on March 1, 1991, and the EPA made its final determination to withdraw the specifications described in the permit on March 27, 1992. See *Final Determination on Remand of the U.S. Environmental Protection Agency's Assistant Administrator Pursuant to Section 404(c) of the Clean Water Act Concerning the Proposed Ware Creek Water Supply Impoundment, James City County, Virginia* 48-49 (Mar. 27, 1992), http://water.epa.gov/lawsregs/guidance/wetlands/upload/WareCreek-RemandFD.pdf.

(as well as at earlier points in the process). C.A. App. 261. In 1992, the Army and the EPA signed a formal memorandum of agreement countenancing certain post-permit EPA actions under Section 1344(c) (pursuant to a procedure that was not triggered in this case). *Id.* at 273. And, as the court of appeals noted, the Corps has agreed in this case that the EPA could withdraw the disposal-site specifications in petitioner's permit. Pet. App. 7, 11 n.3.

2. In 2007, the Corps, acting under Section 1344(a), issued petitioner a permit to fill nearly 7.5 miles of navigable waters in southwestern West Virginia with fill material from a surface coal mine. C.A. App. 985, 988-989 (permit). By its terms, petitioner's permit "does not grant any property rights," and it cautions that the Corps "may reevaluate its decision on the permit at any time the circumstances warrant." *Id.* at 985, 986. The permit specifies 37 disposal sites. *Id.* at 988-989.

Before the Corps issued petitioner's permit, the EPA expressed concerns about petitioner's proposed discharges. Pet. App. 4. Based on the information available at that time, the EPA decided not to exercise its discretion under Section 1344(c) to prohibit the specification of any disposal sites. *Ibid.* By 2009, however, petitioner had discharged fill material into discrete sections of a few of the specified disposal sites, and the EPA asked the Corps to reevaluate the permit in light of "new information and circumstances." *Id.* at 5. Citing new scientific research and data "regarding impairments of streams within [petitioner's] project area," the EPA recommended that the Corps consider suspending, modifying, or revoking the permit. C.A. App. 942 (EPA letter to Corps). The Corps responded

that there were "no factors that currently compell[ed it] to consider permit suspension, modification or revocation." Pet. App. 5 (brackets in original).

The EPA then initiated a proceeding under Section 1344(c) to withdraw the specifications of some of the as-yet-undisturbed disposal sites, based on the EPA's concern that an unacceptable adverse effect on wildlife could result if petitioner's fill material were discharged at those locations. 75 Fed. Reg. 16,805 (Apr. 2, 2010) (notice of proposed determination). As required by the statute and its implementing regulations, the EPA consulted with petitioner, the Corps, and the West Virginia Department of Environmental Protection; it held a public hearing; and it considered more than 50,000 comments, including a comment from the United States Fish and Wildlife Service concluding that such discharges would have an unacceptable adverse effect on wildlife. 76 Fed. Reg. 3127 (Jan. 19, 2011) (notice of final determination).

In 2011, the EPA published a final determination withdrawing the specifications of certain disposal sites in petitioner's permit and preventing their future specification for a comparable discharge. Pet. App. 6. The EPA reiterated its longstanding view that it may act under Section 1344(c) after a permit issues. C.A. App. 908-909 (final determination). The agency also described "the substantial number of project-specific considerations" that drove its "case-specific" determination, *id.* at 868, and discussed how scientific understanding of the impact on wildlife of petitioner's discharges had increased after the permit was issued. 76 Fed. Reg. at 3127. Based on the new scientific and site-specific information (including data from petitioner's post-permit discharges), the EPA concluded that "the

direct burial of 6.6 miles" of "some of the last remaining high quality, least-disturbed headwater stream habitat within the sub-basin" would have "unacceptable adverse effects on wildlife." *Id.* at 3127-3128. The EPA's action left four disposal-site specifications intact, and it did not invalidate petitioner's previous discharges of fill material into any disposal sites. Pet. App. 14 n.5; see 44 Fed. Reg. at 58,077 (regulatory preamble recognizing that, "[u]nder the statutory scheme, [Section 1344(c)] can only be used to *prevent* discharges").

3. Petitioner brought this lawsuit, which advanced two principal claims: first, that the EPA lacks statutory authority to withdraw the specification of a disposal site once it has been included in a permit; and second, that the EPA had violated the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, by acting arbitrarily and capriciously in withdrawing specifications in petitioner's permit. Pet. App. 6, 21.

The district court granted summary judgment in favor of petitioner, holding that the EPA had "exceeded its [statutory] authority * * * when it attempted to invalidate an existing permit by withdrawing the specification of certain areas as disposal sites after a permit had been issued by the Corps under section [1344(c)]." Pet. App. 21, 65. The court concluded that the "EPA's position is inconsistent with the statute as a whole, and that its position could be deemed to be unlawful at the first step" of analysis under *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984). Pet. App. 53. The court "acknowledge[d]," however, "that there is some language in section [1344(c)] itself that could be considered to be sufficiently ambiguous to require the Court to go on to the second step" of *Chevron*. *Ibid.* The

court then concluded that, even assuming the statute is ambiguous, the "EPA's interpretation of section [1344(c)], extending its veto authority indefinitely after a permit has been issued," is not a reasonable one. *Id.* at 64-65. Having found that the EPA lacked statutory authority to act after a permit had been issued, the court declined to consider whether the agency's actions in this case were "arbitrary and capricious under the APA." *Id.* at 60 n.15.

4. On the government's appeal, the court of appeals reversed and remanded for further proceedings. Pet. App. 1-17.

a. With respect to the parties' dispute concerning the EPA's statutory authority, the court of appeals held that "the text of section [1344(c)] does indeed clearly and unambiguously give EPA the power to act post-permit." Pet. App. 15. The court noted that the statute "imposes no temporal limit on the [EPA] Administrator's authority * * * but instead expressly empowers him to prohibit, restrict, or withdraw the specification '*whenever*' he makes a determination that the statutory 'unacceptable adverse effect' will result." *Id.* at 9-10. In addition to "the expansive conjunction 'whenever,'" the court relied on the retrospective connotation of the statutory term "withdrawal," which further "manifests the Congress's intent to confer on EPA a broad veto power extending beyond the permit issuance." *Id.* at 10. The court observed that, because the "EPA's power to withdraw can *only* be exercised post-permit," petitioner's interpretation would "render subsection [1344(c)'s] parenthetical 'withdrawal' language superfluous." *Id.* at 11. The court therefore concluded that Congress has unambiguously given the

EPA "the *final* say on the specified disposal sites" "at *any* time." *Id.* at 10, 13.

The court of appeals did not accept petitioner's contention that a specification may occur only "before (rather than when)" the Corps issues a permit. Pet. App. 12. The court reasoned that, "[d]uring the permitting process, the disposal sites are proposed, reviewed—perhaps even 'specified,' as [petitioner] contends—but the final specifications are included in the permit itself," and they consequently remain subject to the EPA's statutory withdrawal authority. *Ibid.* The court also rejected petitioner's contentions that recognizing a post-permit role for the EPA would conflict with other CWA provisions and legislative history. *Id.* at 13-17.

b. Having reversed the district court's statutory-authority holding, the court of appeals noted that the district court had not addressed petitioner's APA challenge. Pet. App. 17. The court of appeals therefore remanded for the district court to consider that argument "in the first instance." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 9-37) that, because the Corps is given the primary authority to issue permits under Section 404 of the Clean Water Act, 33 U.S.C. 1344, the EPA loses its ability to withdraw the specification of a disposal site once the Corps has issued a permit including that specification. The court of appeals correctly rejected that argument, concluding that, under the plain language of Section 1344(c), the EPA retains its withdrawal authority after permit issuance. Even if the statute were ambiguous, the agency's longstanding interpretation is reasonable and entitled to deference. Petitioner does not allege a

conflict with any decision of this Court or any other court of appeals, and it identifies no reason to believe that the question presented will arise with any frequency. The decision below is interlocutory, moreover, and neither of the lower courts has considered petitioner's claim that the EPA acted arbitrarily and capriciously in the specific circumstances of this case. Review by this Court is not warranted.

1. a. In holding that the CWA did not preclude the EPA's action here, the court of appeals appropriately "enforce[d] plain and unambiguous statutory language according to its terms." *Hardt* v. *Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010). Section 1344(c) authorizes the "withdrawal" by the EPA of "any" disposal-site specification "whenever" the agency makes a determination that discharges at the specified site will have "an unacceptable adverse effect" on particular kinds of resources ("municipal water supplies, shellfish beds and fishery areas * * * , wildlife, or recreational areas"). 33 U.S.C. 1344(c). The court of appeals appropriately grounded its construction of the statute in the breadth of the term "whenever" and in the retrospective connotation of the term "withdrawal." Pet. App. 10-11. "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there," and nothing in the CWA or its legislative history overcomes that strong presumption. *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992).

Petitioner's attempts to evade the plain language of Section 1344(c) are unavailing. Petitioner's principal contention (Pet. 15-20) is that all disposal-site specifications are extinguished at the moment the Corps issues a permit, leaving nothing for the EPA to withdraw

thereafter. That convoluted understanding finds no support in the statute, its legislative history, applicable agency regulations, or any action taken by the Corps or the EPA in more than four decades of practice under the CWA.

Two CWA provisions fix the relationship between permits and specifications. Section 1344(a) authorizes the Corps to "issue *permits* * * * for the discharge of dredged or fill material into the navigable waters *at specified disposal sites*," and Section 1344(b) explains that "each such disposal site shall be *specified for each such permit*" using regulatory guidelines developed by the EPA in conjunction with the Corps. 33 U.S.C. 1344(a) and (b) (emphases added). Those provisions make clear—as petitioner conceded in the court of appeals—that "[y]ou can't have a permit without a specification." C.A. Tr. of Oral Arg. 21; see *id.* at 29 (acknowledging that some permits would contain "specifications" that would remain subject to post-permit withdrawal by the EPA); Pet. C.A. Br. 53 (same).

Whether the Corps specifies disposal sites at the time it issues a permit (as the Corps and the EPA have characterized the process) or does so only at some time before that (as petitioner asserts, Pet. 19), the salient point is that the underlying specifications persist even after a permit is issued. See Pet. App. 12. Indeed, since the CWA generally prohibits pollutant discharges into navigable waters "[e]xcept as in compliance with" the statute's permitting provisions, 33 U.S.C. 1311(a), the specifications play a crucial continuing role in identifying the sites at which pollutants may lawfully be discharged. In order to determine whether a post-permit discharge is authorized by the permit (and therefore lawful), federal regulators must ascertain,

inter alia, whether the discharge was made into one of the specified sites. And Section 1344(c) empowers the EPA to withdraw "any" specification "whenever" the agency makes the necessary adverse-effect determination. 33 U.S.C. 1344(c).[2]

Although petitioner invokes (Pet. 16-18) several later-enacted portions of Section 1344, those provisions did not change the relationship between specifications and permits, much less impliedly limit the scope of the EPA's authority under Section 1344(c). Pet. App. 13-15; see *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 664 n.8 (2007) ("[I]mplied amendments are no more favored than implied repeals."). There is likewise no merit to petitioner's contention (Pet. 21-22) that an ambiguous phrase in a single Senator's floor statement overcomes the plain language of the statute. Pet. App. 15-17. Section 1344(c) means what it says: the EPA may act "whenever" it makes the necessary adverse-effect determination, whether that occurs before or after the Corps has issued a permit. 33 U.S.C. 1344(c). The court of appeals properly applied that unambiguous language in this case.

b. Even if petitioner's contrary reading of the statute were plausible, the court of appeals still reached the correct result. The EPA's construction of Section 1344(c) "governs if it is a reasonable interpretation of

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[2] By giving the EPA authority over "specification[s]" rather than permits, Congress also ensured that the agency can prevent particular "unacceptable adverse effect[s]" even when a discharge would not require a Section 1344(a) permit (as when the Corps specifies disposal sites for its own use without issuing permits to itself). 33 U.S.C. 1344(c); see 33 C.F.R. 336.1(a) and (b)(5) (providing for the EPA's withdrawal of such specifications).

the statute—not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts." *Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009); see *City of Arlington* v. *FCC*, 133 S. Ct. 1863, 1874 (2013).

An express delegation of rulemaking authority is the clearest sign of Congress's intent that an agency will speak with the force of law when it interprets a statute. *Mayo Found. for Med. Educ. & Research* v. *United States*, 131 S. Ct. 704, 713-714 (2011). As relevant here, the CWA contains precisely such a delegation. "Except as otherwise expressly provided," the EPA administers the CWA, and it is authorized to "prescribe such regulations as are necessary to carry out [its] functions." 33 U.S.C. 1251(d), 1361(a). One of its statutorily authorized functions is to withdraw specifications of disposal sites. 33 U.S.C. 1344(c). The EPA therefore spoke with the force of law when it construed Section 1344(c) in its 1979 regulations, and when it subsequently published three post-permit final determinations after notice and comment and a public hearing (in 1981, in 1992, and in this case). See p. 5, *supra*. And while the EPA has very rarely exercised its power to withdraw a specification after a permit has been issued, the agency has adhered since 1979 to the view that it possesses statutory authority to do so. Cf. *Entergy*, 556 U.S. at 224 ("[I]t surely tends to show that the EPA's current practice is a reasonable and hence legitimate exercise of its discretion * * * that the agency has been proceeding in essentially this fashion for over 30 years.").[3]

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[3] Petitioner highlights (Pet. 24) a passage in the EPA's regulatory preamble regarding the agency's "choice" not to use its authority "unless substantial new information is first brought to the Agen-

Petitioner contends (Pet. 23) that the EPA's interpretation of Section 1344 is not entitled to deference because the Corps also administers some aspects of that statutory provision. But the EPA alone is authorized to exercise the withdrawal power conferred by Subsection (c), and the EPA's reading of that provision is owed deference under *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984), notwithstanding the Corps' separate role in issuing permits. With respect to the particular interpretive question at issue here, moreover, the Corps' agreement with the EPA's reading further confirms that deference to that construction is appropriate. Cf. *American Fed'n of Gov't Employees, AFL-CIO, Local 3306* v. *Federal Labor Relations Auth.*, 2 F.3d 6, 10 (2d Cir. 1993) ("[W]hen two agencies, each examining statutes they are charged with administering, agree as to the interplay of the statutes, there is no more reason to mistrust their congruent resolutions than there is to mistrust action taken by a single agency.").

c. Petitioner and several of its supporting amici contend that the court of appeals' decision "threatens to chill private investment" that is "dependent on the finality that comes with a duly-issued Corps permit." Pet. 25; see Pet. 29-32. For at least three related reasons, those dire predictions are implausible.

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cy's attention after [permit] issuance." 44 Fed. Reg. at 58,077. As the preamble made clear, that sensible policy choice did not reflect the EPA's view of the full scope of its Section 1344(c) authority. *Ibid.* And even if the agency had viewed the receipt of "substantial new information" as a statutory prerequisite to its exercise of withdrawal authority, or if a court concluded that the authority could reasonably be exercised only in that circumstance, that prerequisite was satisfied here. See pp. 7-8, *supra*.

First, the court of appeals did not announce a departure from any extant understanding of the EPA's power under Section 1344(c), but simply agreed with the view of the law that the EPA itself has expressed since 1979. Second, the EPA has exercised the power to withdraw specifications post-permit only three times during that period, and petitioner identifies no reason to suppose that the agency will do so more frequently in the future. Third, the Corps itself retains authority to "reevaluate the circumstances and conditions of any permit" even after it has been issued. 33 C.F.R. 325.7. The terms of a Corps permit therefore will remain subject to potential change, whether or not the EPA is authorized to withdraw specifications after the permit's issuance. For all those reasons, the decision below is unlikely to have any significant impact on potential developers' assessments of the risks and benefits of their contemplated courses of action.

Petitioner relies heavily (Pet. 11-15) on the general regulations at 33 C.F.R. 325.7, which govern the Corps' modification, suspension, or revocation of a variety of permits issued under the CWA and other statutes. See 33 C.F.R. 320.2, 325.1(a). Those regulations, however, do not necessarily reflect the full extent of the Corps' *statutory* authority to reexamine Section 1344(a) permits. And it is unsurprising that, in light of the two agencies' distinct authorities under Section 1344, Congress directed them to consider somewhat different factors when carrying out their respective functions. Compare 33 U.S.C. 1344(b)(1) (directing the Corps to consider factors "comparable to" the seven criteria listed in 33 U.S.C. 1343(c)), with 33 U.S.C. 1344(c) (directing the EPA to consider whether certain "unac-

ceptable adverse effect[s]" will result from a discharge).

Petitioner's arguments concerning the practical disincentives assertedly created by the decision below depend on the premise that potential developers will view the risk of post-permit EPA withdrawal as substantially greater than the risks created by the Corps' analogous (and unquestioned) post-permit authority. But the EPA's power to "withdraw[]" a specification is subject to both substantive and procedural constraints, see 33 U.S.C. 1344(c), and it has been used very sparingly in the past. To be sure, the risk to the permittee that authorization to use a specified disposal site will be revoked or withdrawn post-permit is slightly greater if two agencies rather than one are authorized to effect such a change. The history of Section 1344's implementation, however, provides no plausible reason to suppose that the decision below will add any meaningful increment of uncertainty to potential developers' calculations.

Petitioner emphasizes (*e.g.*, Pet. 4, 10, 12, 13) the Corps' "lead" role in administering the Section 1344 permitting program, and it refers to the EPA's post-permit objections to specified disposal sites as objections "that failed to carry the day in the [pre-permit] inter-agency discussions" (Pet. 9; see Pet. 26, 33). Those statements might suggest that the EPA's only recourse pre-permit is to attempt to persuade the Corps not to allow discharges at particular sites. Section 1344(c) makes it entirely clear, however, and petitioner obliquely acknowledges (Pet. 20), that the EPA may "prohibit" the specification of a particular disposal site, thereby precluding the Corps from issuing a permit that authorizes discharges at that location. 33

U.S.C. 1344(c); see *Coeur Alaska, Inc.* v. *Southeast Alaska Conservation Council*, 557 U.S. 261, 270 (2009) (noting the EPA's "statutory authority to veto the Corps permit, and prohibit the discharge," based on the environmental considerations identified in Section 1344(c)). Since the EPA has clear statutory authority pre-permit to bar the use of disposal sites that the Corps might otherwise deem appropriate, and since the Corps has unquestioned power to modify the terms of issued permits, recognizing the EPA's similar power to act post-permit is fully in keeping with the overall statutory scheme.

d. Petitioner's new takings and retroactivity arguments (Pet. 32-34) are both forfeited and unpersuasive. Constitutional-avoidance and anti-retroactivity presumptions are inapplicable where (as here) the intent of Congress is clear. See *Clark* v. *Martinez*, 543 U.S. 371, 384 (2005); *Landgraf* v. *USI Film Prods., Inc.*, 511 U.S. 244, 280 (1994). And, even assuming that the EPA's third post-permit determination under Section 1344(c) in 41 years could give rise to a valid regulatory-taking claim, "the possibility that the application of a regulatory program may in some instances result in the taking of individual pieces of property is no justification for the use of narrowing constructions to curtail the program if compensation will * * * be available * * * where a taking has occurred." *United States* v. *Riverside Bayview Homes*, 474 U.S. 121, 128 (1985).

Any retroactivity concerns are ameliorated here by the EPA's interpretation of Section 1344(c), which acknowledges that the agency cannot invalidate any previous discharges that were authorized under a permit before a specification was withdrawn. See 44 Fed. Reg. at 58,077 (regulatory preamble); see Pet. App. 14

n.5. While permits do shield their holders from subsequent changes to general regulations, 33 U.S.C. 1344(p), longstanding statutes and regulations put petitioner and other permittees on notice that their individual permits could be modified and their specifications withdrawn using statutory and regulatory criteria that petitioner has not challenged. 33 U.S.C. 1344(c); 33 C.F.R. 325.7; 40 C.F.R. Pt. 231.

There is accordingly no merit to petitioner's contention that the EPA lacks statutory authority to withdraw specifications under Section 1344(c) after a permit has been issued by the Corps.

2. The court of appeals' decision does not conflict with any decision of this Court or of any other court of appeals. Other than the district court in this case, every court to address the EPA's post-permit authority under Section 1344(c) has reached the same conclusion as the court of appeals did here. See *Hoosier Envtl. Council, Inc.* v. *United States Army Corps of Eng'rs*, 105 F. Supp. 2d 953, 971 (S.D. Ind. 2000); *City of Alma* v. *United States*, 744 F. Supp. 1546, 1559-1560 (S.D. Ga. 1990); cf. *James City County, Va.* v. *EPA*, 955 F.2d 254 (4th Cir. 1992) (remanding a Section 1344(c) determination to allow the EPA to consider whether to withdraw specifications included in a Section 1344(a) permit). The general consensus among the lower courts on this narrow, and infrequently recurring, question of statutory construction counsels against further review.

Petitioner contends (Pet. 36-37) that the court of appeals' decision is in tension with "guidance from this Court on the need for regulatory clarity under section [1344]." In *Coeur Alaska*, this Court observed that dischargers benefit from certainty regarding which agency—the Corps (under Section 1344) or the EPA

(under 33 U.S.C. 1342)—can issue the relevant CWA permit. 557 U.S. at 266-277. But the decision below does not implicate that division of authority because the court of appeals did not question the Corps' exclusive authority to issue permits for the discharge of dredged or fill material into navigable waters. Pet. App. 13. Instead, it merely recognized that the EPA has an important role under Section 1344—as this Court has also recognized. See *Coeur Alaska*, 557 U.S. at 270 (noting the EPA's "statutory authority to veto the Corps permit," and distinguishing that authority from the separate power to issue a discharge permit under 33 U.S.C. 1342); *Rapanos* v. *United States*, 547 U.S. 715, 760 (2006) (Kennedy, J., concurring in the judgment) (noting that the EPA "oversees the Corps' * * * permitting decisions") (citing, *inter alia*, 33 U.S.C. 1344(c)).

3. Finally, the interlocutory posture of this case is a sufficient basis, by itself, to deny certiorari. See, *e.g.*, *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

In addition to the notice, hearing, consultation, and publication requirements that Congress has prescribed in Section 1344(c), the EPA's authority to withdraw a specification is further constrained by the APA's prohibition of agency action that is "arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. 706(2)(A). Neither the district court nor the court of appeals has addressed petitioner's alternative contention that, even if Section 1344(c) authorizes the EPA to withdraw a specification after a permit has been issued, the agency's exercise of that authority in the circumstances of

this case violated the APA. Pet. App. 17, 60 n.15. Petitioner urged the court of appeals not to address that question in the current appeal (Pet. C.A. Br. 57-59), and the court of appeals remanded the case with instructions for the district court to decide petitioner's APA challenge "in the first instance." Pet. App. 17.

In arguing that the EPA lacks statutory authority to act post-permit to bar the use of specified disposal sites, petitioner repeatedly contends that such power, if recognized, might be exercised in an arbitrary manner. See, *e.g.*, Pet. 14-15 (stating that, under the court of appeals' decision, the EPA "may effectively revoke an existing permit under section [1344(c)] without regard to the permit holder's compliance history and legitimate reliance interests, and even if no new information has come to light"); Pet. 32 (stating that the economic activity resulting from 60,000 annual permits under Section 1344 should not be "subject to EPA's caprice"); Pet. 33 (contending that the EPA did not "point[] to new evidence or consider[] [petitioner's] substantial reliance interests"). But if petitioner believes that such arbitrary conduct occurred in this case, its pending APA challenge is the appropriate avenue for judicial consideration of that claim. Contrary to petitioner's suggestion (Pet. 29), the mere possibility that the EPA's withdrawal power could be exercised unreasonably is no reason to conclude that the power does not exist. The pendency of petitioner's separate APA challenge to the EPA's withdrawal decision therefore provides a further reason for this Court to deny review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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